

DOCKET NO. US-369 SEP 14 2005

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005**

**IN THE MATTER OF
JUAN DOMINGO CORTEZ
— Petitioner**

v.

**UNITED STATES OF AMERICA
Respondent**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

**Federal Medical Center
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QUESTIONS PRESENTED FOR REVIEW

1. Is the Fifth Circuit case law on "Statutory Maximum Sentence" contrary to the holdings of **Blakely/Apprendi**?
2. Is miscarriage of justice an exception to the Appeal Waiver of Cortez?
3. There is a split in the Circuits as to Appeal Waivers of **Blakely/Apprendi** "Statutory Maximum Sentences."
4. Was Cortez's "Waiver" an intentional relinquishment of a known right to trial by jury with proof beyond a reasonable doubt of all sentencing elements and facts?
- 5(a). Does the record support the argument that Cortez had the right to appeal his sentence?
- 5(b). Was the Fifth Circuit Mandate to Remand for determination that the sentence was imposed in violation of law?

Rule 14.1(b) Statement

LIST OF PARTIES

Juan Domingo Cortez

Petitioner

Sam Cummings

U.S. District Judge

Roger L. McRoberts

Asst. U.S. Attorney

Gerald Goldstein

Attorney at law

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STATEMENT FOR BASIC FOR JURISDICTION

(A)

The decisions sought to be reviewed were entered on June 16, 2005 (Appendix-A), and January 10, 2005 (Appendix-C).

(B)

Petition for rehearing was granted on February 25, 2005 (Appendix-B)

(C)

The Fifth Circuit's decision was filed on June 16, 2005. This Court has jurisdiction pursuant to 28 U.S.C. §1254 to review (Appendix-A).

**CONSTITUTIONAL PROVISIONS,
TREATIES, STATUTES, ORDINANCES AND
REGULATIONS INVOLVED**

The Fifth Amendment of the United States Constitution is (Appendix-D). The Sixth Amendment of the United States Constitution is (Appendix-E). The Fourteenth Amendment of the United States Constitution is (Appendix-F). Federal Rules of Criminal Procedure Rule-11 is (Appendix-G); 18 U.S.C. 3742 "Review of Sentence" is (Appendix-O).

OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the Fifth Circuit Rehearing decision is (Appendix-A). The first decision of the United States Court of Appeals for the Fifth Circuit is (Appendix-C). The Order granting the Petition for Rehearing is (Appendix-D). The Judgment and Commitment Order from the United States District Court for the Northern District of Texas, San Angelo Division is (Appendix-B).

STATEMENT OF THE CASE

Petitioner was indicted (Appendix-H) by the United States in a ten (10) count indictment. Subsequently, Petitioner entered into a Plea Agreement (Appendix-J) which included a Factual Resume (Appendix-K), that the plea was pursuant to a one (1) count Information (Appendix-I). The plea was to 18 U.S.C. § 666(a) and 18 U.S.C. § 2. Petitioner was sentenced to a term of 93 months pursuant to an "Applicable Guideline Range."

Petitioner timely filed his Notice of Appeal (Appendix-L) and the Fifth Circuit Court of Appeals on January 10, 2005

issued a Per Curiam Decision (Appendix-C) deciding that *Blakely* does not apply to the Sentencing Guidelines, therefore Cortez's arguments under *Blakely* are foreclosed, and granted the Government's Motion to Dismiss.

The Fifth Circuit Opinion also set forth, that out of an abundance of caution, and because Appellate-Waiver provisions are to be construed against the Government, the Court considered Cortez's *Blakely* argument.

One day later, this Court decided *U.S. v. Booker* 543 U.S. __ 2005 and *U.S. v. Fanfan* 543 U.S. __ 2005 and Petitioner filed for a Panel Rehearing which was granted (Appendix-B).

One June 16, 2005 the same Panel in a Per Curiam decision (Appendix-A) determined that:

A. Cortez's Appeal Waiver was validly made;

B. The natural and ordinary meaning of the "upper limit of punishment is that which Congress has legislatively specified for violation of a Statute," citing *United States v. Rubbo*, 396 F3d 1330, 1334 (11th Cir. 2005);

C. The Maximum Statutory sentence under 18 U.S.C. § 666(a) is ten years; and

D. The Waiver is upheld.

Therefore, the United States Court of Appeals had jurisdiction to review the conviction and sentence of the United States District Court for the Northern District of Texas, pursuant to 28 U.S.C. § 1291, and this Court has jurisdiction to review the Fifth Circuit Court of Appeals

decision pursuant to 28 U.S.C. 1254(1).

QUESTION #1
IS FIFTH CIRCUIT CASE LAW ON "STATUTORY
MAXIMUM SENTENCE" CONTRARY TO
THE HOLDINGS OF BLAKELY/APPENDI?

The United States Court of Appeals for the Fifth Circuit's decision (Appendix-A) is in conflict and contrary to this Court's decisions in *Appendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington* 542 U.S. ____ (2004) as applied by *U.S. v. Booker* 543 U.S. ____ (2005), and therefore has so departed from the accepted judicial proceedings in a hierarchical court system, that the Fifth Circuit has decided that it need no longer to follow decisions of the United States Supreme Court, even though it is self-evident that lower Court's must adhere to this Court's precedent. *Thurston Motors Lines Inc. v. Jordan K. Rand, Ltd*, 460 U.S. 533, 535 (1983), and only this Court can overrule one of its precedent. *Rodriguez de Quijas v. Shearson/American Express, Inc.* 490 U.S. 477, 484 (1989).

Therefore, based upon the following arguments, the Supreme Court should grant Certiorari to protect the integrity of its' decision making process.

It is hard to dispute that in a country with a national government such as our's that the Fifth Circuit should not be held to have laid down one rule in their Circuit and the Seventh and Ninth Circuit have laid down another rule because they disagree with one other, see William H. Rehnquist, The Changing Role of the Supreme Court, 14 Fla. St. U.L. Rev. 1, 11-12 (1986).

One of the duties of this Court is to do its best to see that

its decisions are not being applied differently in various Circuits around the country, which has been an important criterion of the exercise of the Court's power since most of this Court's Jurisdiction was made discretionary in 1924.

The decision (Appendix-A) pages 2 and 3 states that the "..... statutory maximum shall be afforded its natural and ordinary meaning of "upper limit of punishment that Congress has legislatively specified for violations of a Statute." citing *Rubbo* 396 F3d at 1334-1335 which this Court has scheduled for conference on September 25, 2005.

The *Blakely* Court which is comprised of the same Justices as *Apprendi* set forth that "..... in other words, the relevant "statutory maximum" is not the maximum sentence a Judge may impose after finding additional facts, but the maximum he may impose without any additional findings...." not what 18 U.S.C. § 666(a) allows.

Therefore, is the Fifth Circuit's decision violating Cortez's rights and contrary to this Court's plain meaning of "statutory maximum?"

QUESTION #2

IS MISCARRIAGE OF JUSTICE AN EXCEPTION TO THE APPEAL WAIVER OF CORTEZ?

Blakely/Apprendi teaches, in plain concise language that a defendant's sentence exceeds the "statutory maximum" when it is based upon facts not reflected in the jury verdict or admitted by the defendant, see *United States v. Rosales*, 2005 WL 1162935 Lexis 9379 (8th Cir. May 18th, 2005) (Heaney J. Dissenting), which then meets the miscarriage-of-justice exception to appeal waivers.

If this Appeal Waiver is let stand it seriously affects the fairness, integrity and public reputation of the judicial proceedings, in that the "I Gotcha" defense of the government is contrary to the Constitution, see *United States v. Maldonado* __ F3d __ (10th Cir. June 14, 2005).

The reason is simple, Cortez objected to the P.S.I. and signed a Plea Agreement that did not include factual statements as to the relevant conduct and enhancements which is a Sixth Amendment violation, see *United States v. Claudio*, 2005WL 901860 LEXIS 7222 (11th Cir. April 19, 2005; *United States v. McCully* 407 F3d 931 (8th Cir. 2005).

The Fifth Circuit stated that a Waiver of Rights under §2255 or rights to appeal "do not preclude review of a sentence that exceeds the "statutory maximum," see *U.S. v. Hollins*, 2004 U.S. App. LEXIS 8766 (5th Cir. May 4, 2004) (collecting cases).

Therefore, all the rhetoric makes clear that this Court needs to invoke its supervisory power and make clear that what it had decided as the "statutory maximum" is to protect the fairness and integrity of the judicial process. Specifically, this Court since *Apprendi* has continued with the statement that not only must all the facts increasing the "Applicable Guidelines Range" for the offense of conviction be submitted to the jury or admitted by the defendant "they must also" be charged by the Grand Jury in the indictment, see *United States v. Cotton*, 535 U.S. 625, 627 (2002).

Can Cortez's plea waive the *Blakely* error that occurred afterwards? And, the Fifth Circuit decided that judicially determined enhancements made under a Mandatory Guideline regime violated *Shabazz's* Sixth Amendment right to trial, see *United States v. Shabazz* 04-40903, (5th Cir. May

26, 2005).

QUESTION #3

THERE IS A SPLIT IN THE CIRCUITS AS TO APPEAL WAIVERS OF BLAKELY/APPRENDI "STATUTORY MAXIMUM SENTENCES"

There are a number of opinions among the Circuits as to Appeal Waivers under *Blakely/Apprendi* Sixth Amendment violations ruling as follows:

Second Circuit: Found an appeal waiver valid as to Sixth Amendment claim where sentence fell within the "range" stipulated in the Plea Agreement; *United States v. Fleisher* 2005 WL 272113 U.S. App. LEXIS 1779 (2nd Cir. Feb. 3, 2005); enforcing waiver of appeal where defendant raised *Blakely* challenge at sentencing, see *United States v. Haynes* ___ F.3d ___ (2nd Cir. June 13, 2005).

Third Circuit: Where defendant entered into a plea agreement in which he waived his right to appeal as to *Blakely/Apprendi* claim is entitled to re-sentencing see *United States v. Lockett*, 406 F.3d, 207 (3rd Cir. 2005).

Fourth Circuit: A defendant cannot waive appeal of an unconstitutional sentencing procedure, as that falls outside the scope of waiver, see *United States v. Blick*, 408 F.3d 162, (4th Cir. 2005)(dissenting opinion).

Sixth Circuit: That defendant knowingly and voluntarily waived appeal precludes Booker claim, see *United States v. Lubbert* ___ F.3d ___ (6th Cir. 2005).

Seventh Circuit: A sentence in excess of the "statutory maximum" sentence for the defendant's crime is based upon

a Constitutionally impermissible criteria, *United States v. Bownes* 405 F.3d 634, 637 (7th Cir. 2005) citing *United States v. Johnson* 347 F.3d 412, 414-15 (2nd Cir. 2003), and can be challenged on appeal even if the defendant executed a blanket waiver of appeal rights.

Eighth Circuit: Unless expressly reserved however, the right to appellate relief under *Booker* is among the rights waived by a valid plea waiver, *United States v. Fogg* 409 F.3d 1022 (8th Cir. 2005), contra, where plea agreement waived appeal issues not specifically listed in or addressed by the plea agreement, finding waiver of appeal did not preclude appeal as to Constitutionality of Guidelines after *Blakely* because "the issue was not specifically addressed or listed," *United States v. Lea* 400 F.3d 1115 (8th Cir. 2005). Simply put, the standard of proof is not the defendant's to waive; it is a burden placed upon the Government the defendant could not have knowingly waived rights that neither he nor the Court knew he had before *Blakely*, see *United States v. Terrell* 2004 U.S. Dist LEXIS 13781 (D. Neb. July 22, 2004). An illegal sentence is a satisfactory exception to waivers. *United States v. Burns* 409 F.3d 994 (8th Cir. 2005).

Ninth Circuit: Waiver of appeal was unenforceable where, although the District Court mentioned possibility of Appeal Waiver during Plea Colloquy. It failed to discuss the specific terms of the waiver, the waiver was not therefore knowingly and voluntarily made, see *United States v. Alarid* 2005 WL 375728 LEXIS 2837 (9th Cir. Feb. 17, 2005).

Tenth Circuit: Finding waiver to be enforceable and that defendant knowingly and voluntarily waived appellate rights. *United States v. Green* 405 F.3d 1180 (10th Cir. 2005).

Eleventh Circuit: An appeal waiver includes the waiver of

the right to appeal difficult or debatable legal issues or even blatant error, see *United States v. Frye* 402 F.3d 1123 (11th Cir. 2005).

These "split decisions" play the "I Gotcha" game with appellants. That is "I Gotcha" because you signed a waiver that failed to be specific as to all the above case law, proving that yet again, *Blakely* justice and procedure now depends very much on the Circuit in which a case is litigated.

QUESTION #4

WAS CORTEZ'S "WAIVER" AN INTENTIONAL RELINQUISHMENT OF A KNOWN RIGHT TO TRIAL BY JURY WITH PROOF BEYOND A REASONABLE DOUBT OF ALL SENTENCING ELEMENTS AND FACTS?

In dictum, this Court stated "[when a defendant plead's guilty, the [government] is free to seek Judicial Sentence Enhancements, so long as the defendant stipulates to the relevant facts or **consents** to Judicial Fact-finding." *Blakely* 124 S.Ct. at 2541 (Emphasis added) (citing *Apprendi v. New Jersey* 530 U.S. 466, 488 (2000)).

However, the waiver-by-admission language in *Blakely* is inconsistent with this Court's precedent. That is, *Blakely* cited a specific page in *Apprendi* that discussed *Almendarez-Torres v. United States* 523 U.S. 244 (1998). It cannot be denied, however, that *Almendarez-Torres* dealt only with the situation where a defendant admits to the fact of a prior conviction, not to the facts that increase the relevant statutory maximum sentence, see *Apprendi* 530 U.S. at 487-488.

Therefore, neither *Almendarez-Torres* nor *Apprendi* condoned Cortez waiving his Constitutional rights simply by

admitting essential facts that increased the relevant statutory maximum sentence, but, that were not related to the fact of a prior conviction.

This Court has not sanctioned such a "waiver," and Cortez did not "waive" his *Blakely/Apprendi* rights, and such a "waiver" is not so easily given when the facts are used to increase the relevant statutory maximum sentence. Cf. *Blakely*, 124 S.Ct. 2537; *Apprendi* 530 U.S. at 490.

This Court has held that "Court's indulge every reasonable presumption against waiver of fundamental Constitutional rights.....a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege" see *Johnson v. Zerbst* 304 U.S. 458, 464 (1938). Here, Cortez was sentenced to an additional term of imprisonment for uncharged conduct.

Accordingly, the District Court cannot piggyback Cortez's admission of facts, to increase the relevant statutory maximum sentence onto his plea of guilty to 18 U.S.C. 666(a) and 2. Moreover, if allowed, there would be no guarantee that Cortez was aware of his rights to a jury trial with proof beyond a reasonable doubt, with regard to those facts. The fact is the Federal Rules of Criminal Procedure Rule-11 and Cortez's plea transcript is void of any such warning.

The Federal Rules of Criminal Procedure provides further support that Cortez's simple admissions at his Plea Hearing and his Plea Agreement are insufficient to waive his Constitutional and Statutory rights, see *Brady v. United States* 397 U.S. 742, 748 (1970).

Rule-11 includes a plethora of Constitutional and

Statutory rights that a sentencing Court must address. The fact that Rule-11 requires the sentencing Court to personally address these rights with the defendant, and ensure that he knows which rights are being waived, and that it is voluntary, is "fact" that Cortez was not advised he was waiving his right to have a jury find all the facts with proof beyond a reasonable doubt of his simple admission.

Because Rule-11 did not address Cortez's *Blakely/Apprendi* rights, the colloquy was inadequate to confirm knowingly and intelligently.

Johnson and its' progeny pellucidly holds that in order for Cortez's admissions to act as a valid waiver of rights, the government must have provided a sufficient waiver as a part of the plea, and the District Court must then perform a proper plea colloquy, informing Cortez of the waiver of those Constitutional rights, regarding specific factual admissions.

Here, the admission and use of relevant conduct to enhance Cortez's sentence is problematic, in that he pled guilty to a one-count information that did not include the specific-offense characteristics used for enhancement.

Therefore, *Blakely*, citing *Apprendi*, discussing *Almendarez-Torres*, does not support the proposition that Cortez waived his Constitutional rights simply by pleading guilty and admitting facts which were not related to any prior conviction that increased his relevant statutory maximum sentence.

The question is, was Cortez sufficiently apprized of his Constitutional rights that he could knowingly and intelligently waive his right to direct appeal, or was he so misled by the proceedings that he thought his Constitutional

rights were all being afforded to him?

For this reason alone this Court should exercise its supervisory power to set forth the law on Appeal Waiver, as to knowingly and voluntarily of *Blakely/Apprendi* errors.

QUESTION #5(A)

DOES THE RECORD SUPPORT THE ARGUMENT THAT CORTEZ HAD THE RIGHT TO APPEAL HIS SENTENCE?

Cortez signed a Plea Agreement that includes section 12 waiver of right to appeal or otherwise challenge sentence (Appendix-J). It clearly states that Cortez waives his rights under 28 U.S.C. §1291 and 18 U.S.C. §3742 to appeal his conviction or sentence. However in the reservation of rights on page 6, Cortez reserved his right to a direct appeal of (i) a sentence exceeding the statutory maximum punishment, and (iii)(b) the voluntariness of his waiver.

At the Plea Hearing (Appendix-M) the Court states that "..... in effect giving up your right to appeal.....except for the limited reasons set forth in that paragraph (Paragraph-12)."

At sentencing (Appendix-N) the Court advised Cortez that he had the right to appeal as stated in the Plea Agreement.

QUESTION #5(b)

WAS THE FIFTH CIRCUIT MANDATE TO REMAND FOR DETERMINATION THAT THE SENTENCE WAS IMPOSED IN VIOLATION OF LAW?

The Seventh Circuit in *United States v. Gibson* 356 F.3d 761, 767 (7th Cir. 2004) stated "that to allow an illegal sentence to stand would impugn the fairness, integrity, and

public reputation of the judicial proceedings.....”

18 U.S.C. §3742(F)(1) (Appendix-O) sets forth the mandate for the Fifth Circuit when it uses the word “shall.” Cortez waiver (Appendix-J, #12) sets forth that he reserved his appellate rights under 18 U.S.C. § 3742 (a)(1)(2)(3) and (e) (1) (2)(3) and (iii); (F)(1)(2)(A).

The Fifth Circuit’s opinion (Appendix-A) affirmed an illegal sentence, and seeks to justify the sanctioning of the illegal sentence and its own failure to comply with 18 U.S.C. 3742 by stating “the maximum statutory sentence that could be imposed for Cortez’s offense was ten (10) years 18 U.S.C. §666(a). Cortez’s 63-month sentence does not fall within the exception to the “Appeal Waiver,” and cites no authority for this bizarre proposition.

Fifth Circuit precedent, ignored in Cortez appeal, is a sentence illegally imposed, is the responsibility of the Fifth Circuit to ensure compliance with the Statute [18 U.S.C. §3742], *United States v. Schmeitzer* 960 F.3d 405, 408-409 (5th Cir. 1992).

Here, should the precedent of this Court, and the Fifth Circuit be followed, and the statutory commands of 18 U.S.C. §3742 *et seq.* by the imposition of a lawful sentence in Cortez’s case?

It is therefore beyond peradventure that Cortez has the right under the terms of the Plea Agreement and the Plea Colloquy to prosecute the appeal that the Fifth Circuit denied.

Therefore, this Court should exercise its supervisory powers and order the Fifth Circuit to grant the appeal pursuant to the record in this case.

CONCLUSION

Blakely articulates the simple and sound principle that any factual findings concerning any criminal offense, which by law defines punishment levels, is exactly what is a "crime" in Article III §2 of the Constitution, to which a Sixth Amendment jury trial right attaches.

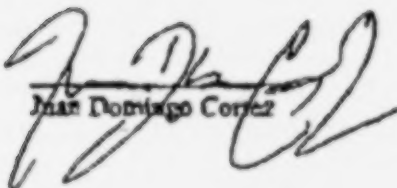
The standard of proof [beyond a reasonable doubt] is not the defendant's to waive. It is a burden placed on the Government, without which a sentence cannot be enhanced above the relevant "statutory maximum".

Cortez could not have knowingly and intentionally waived these rights that neither he nor the United States District Judge knew he had prior to *Blakely*.

Cortez cannot waive his rights and did not waive his right to appeal his illegal sentence above the relevant "statutory maximum," and *Blakely* errors are 1 - w sentences above the relevant "statutory maximum."

Cortez asks this Court under its supervisory power to grant the Certiorari either to settle the split in the Circuits or to bring continuity in the lower Courts as to this Court's decisions.

Respectfully Submitted,


Juan Domingo Cortez

APPENDIX



APPENDIX-A
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04—10152
Summary Calendar

United States Court of Appeals

Fifth Circuit

FILED

June 14, 2005

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA

versus **Plaintiff-Appellee,**

JUAN DOMINGO CORTEZ, also known as J.D. Cortez,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON REHEARING -

Before GARZA, DeMOSS and CLEMENT, Circuit Judges.
PER CURIAM:

We granted panel rehearing in light of the holding in United States v. Booker, 125 S. Ct. 738 (2005) that Blakely v. Washington, 124 S. Ct. 2531 (2004) is applicable to the federal sentencing guidelines. We now withdraw our earlier opinion and substitute the following. See FED. R. App. P. 40(a) (4) (C).

Juan Domingo Cortez appeals his sentence imposed

following his guilty plea to theft or embezzlement concerning programs sentenced to a term of imprisonment of 63 months to be followed by a three-year term of supervised release. Cortez was also ordered to pay restitution in the amount of \$805,083.55 and a fine of \$20,000.

The Government filed a motion to dismiss based on an appeal waiver in Cortez's plea agreement. The record reflects that Cortez knowingly and voluntarily waived his right to appeal his sentence in his plea agreement and, thus, that the waiver was validly made. United States v. Robinson, 187 F.3d 516, 517 (5th Cir. 1999). However, Cortez argues that he did not waive the right to appeal a sentence above the statutory maximum as that term was defined in Blakely.

The language in the appellate waiver must be afforded its plain meaning in accord with the intent of the parties at the time the plea agreement was executed. United States v. McKinney, F.3d , No. 04—41223, 2005 WL 887153 at *2_3 (5th Cir. Apr. 15, 2005). There is no indication that the parties intended that the exception in the appellate waiver for "a sentence exceeding the statutory maximum punishment" would have a meaning other than its ordinary and natural meaning. ID.; see United States v. Rubbo, 396 F.3d 1330, 1334—35 (11th Cir. 2005); United States v. West, 392 F.3d 450, 460—61 (D.C. Cir. 2004). Thus, the exception for a sentence imposed above the statutory maximum shall be afforded its natural and ordinary meaning of "the upper limit of punishment that Congress has legislatively specified for violations of a statute." Rubbo, 396 F.3d at 1334—35.

The maximum statutory sentence that could be imposed for Cortez's offense was ten years. 18 U.S.C. § 666(a). His 63-month sentence does not fall within the exception to the appeal waiver. The waiver is upheld, the Government's motion to dismiss is GRANTED, and the appeal is DISMISSED. United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992)

APPENDIX-B
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 04-10152

UNITED STATES OF AMERICA
Plaintiff Appellee

U.S. COURT OF APPEALS
FILED

FEB 25 2005

v.

CHARLES R. FULBRIGHT III
CLERK

JUAN DOMINGO CORTEZ also known as, J D Cortez
Defendant Appellant

Appeal from the United States District Court for the Northern
District of Texas, San Angelo

ON PETITION FOR REHEARING

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing is granted.
ENTERED FOR THE COURT:

"s/ Emilio M. Garza
United States Circuit Judge"



APPENDIX-C
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10152
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

January 18, 2005

Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

verses

JUAN DOMINGO CORTEZ, also known as J.D. Cortez,
Defendant—Appellant.

Appeal from the United States District Court for the Northern
District of Texas
USDC No. 6:03-CR-24-I-C

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.
PER CURIAM: *

Juan Domingo Cortez appeals his sentence imposed following his guilty plea to theft or embezzlement concerning programs receiving federal funds and aiding

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

and abetting. Cortez was sentenced to a term of imprisonment of 63 months to be followed by a three—year term of supervised release. Cortez was also ordered to pay restitution in the amount of \$805,083.55 and a fine of \$20,000

The Government argues that Cortez waived his right to appeal his sentence in his plea agreement. Cortez responds that he did not waive his right to appeal a sentence above the statutory maximum and that, under Blakely v. Washington, 124 S. Ct. 2531 (2004), the constitutional statutory maximum sentence that could be imposed upon him was 41 months.

The record reflects that Cortez knowingly and voluntarily executed the waiver contained in his plea agreement and, thus, the waiver was validly executed. United States v. Robinson, 187 F.3d 516, 517 (5th Cir. 1999). However, the Supreme Court in Blakely held “that the ‘statutory maximum’ for Apprendi^{**1} purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” Blakely, 124 S. Ct. at 2537 (italics omitted). The waiver in Cortez’s plea agreement contained an exception for sentences imposed above the statutory maximum. Thus, out of an abundance of caution and because appellate—waiver provisions are to be construed against the Government, see United States v. Somner, 127 F.3d 405, 408 (5th Cir. 1997), the court will consider Cortez’s Blakely argument.

Relying on Blakely, Cortez argues that his 63-month sentence was unconstitutional because there was no proof beyond a reasonable doubt presented to a jury to support the enhancements of his offense level based on the abuse of trust or obstruction of justice. He further argues that under Blakely, the restitution order is unconstitutional because it was based on

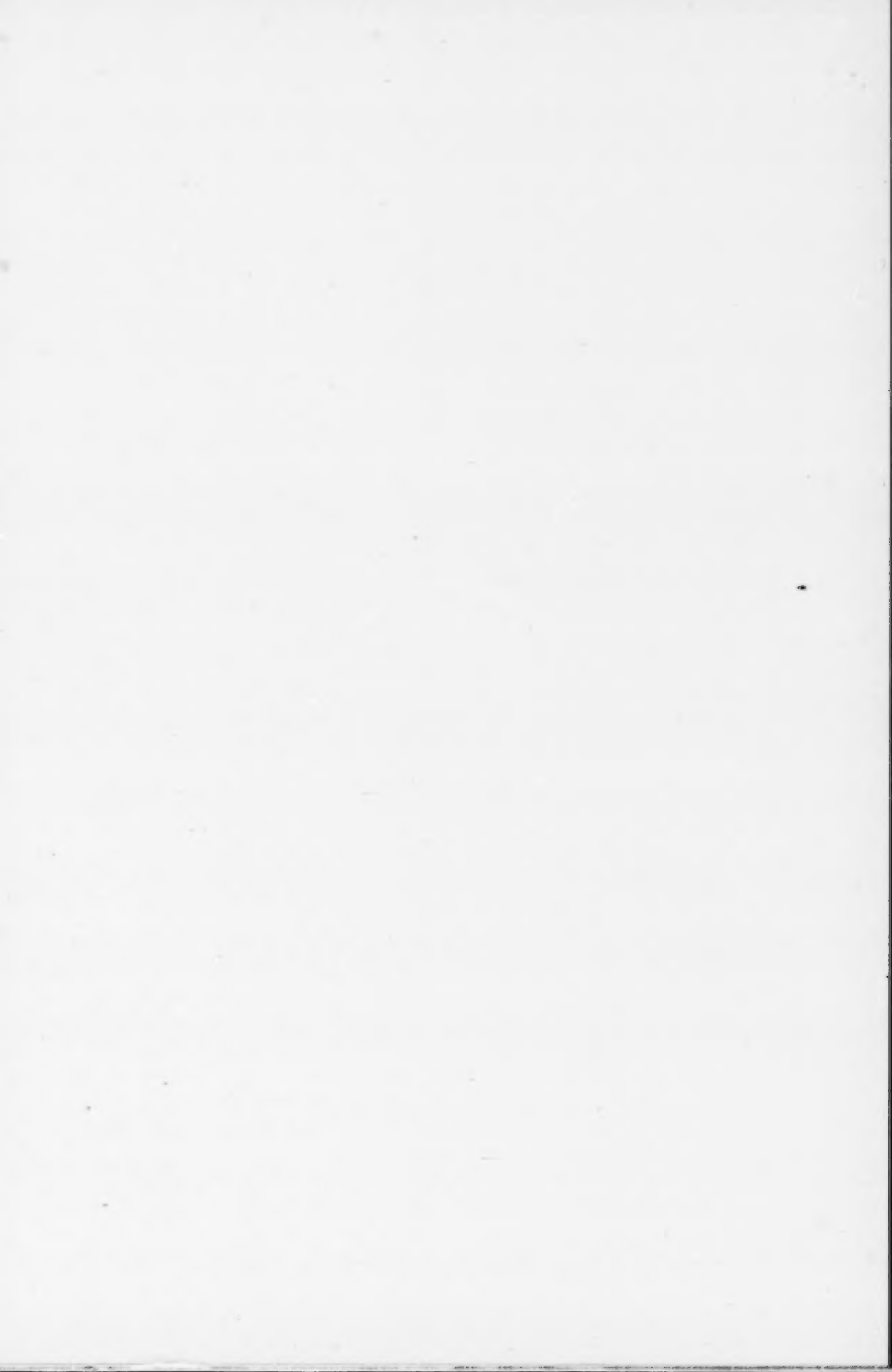
Apprendi v. New Jersey, 530 U.S. 466 (2000)

facts not submitted to the jury.

This court has held that Blakely does not apply to the federal sentencing guidelines. See United States v. Pineiro, 377 F.3d 464, 473 (5th Cir.), petition for cert. denied. denied. filed (U.S. July 14, 2004). Therefore, Cortez's arguments under Blakely are foreclosed.

Cortez argues that the district court erred in failing to grant his motion for a downward departure based on his physical condition. He also alleges that the fine imposed is erroneous because the district court did not consider whether the fine would impair Cortez's ability to make restitution. Neither of these issues are included in the exceptions to Cortez's voluntary waiver of his right to appeal his sentence. Thus, the departure ruling and the fine are not subject to review.

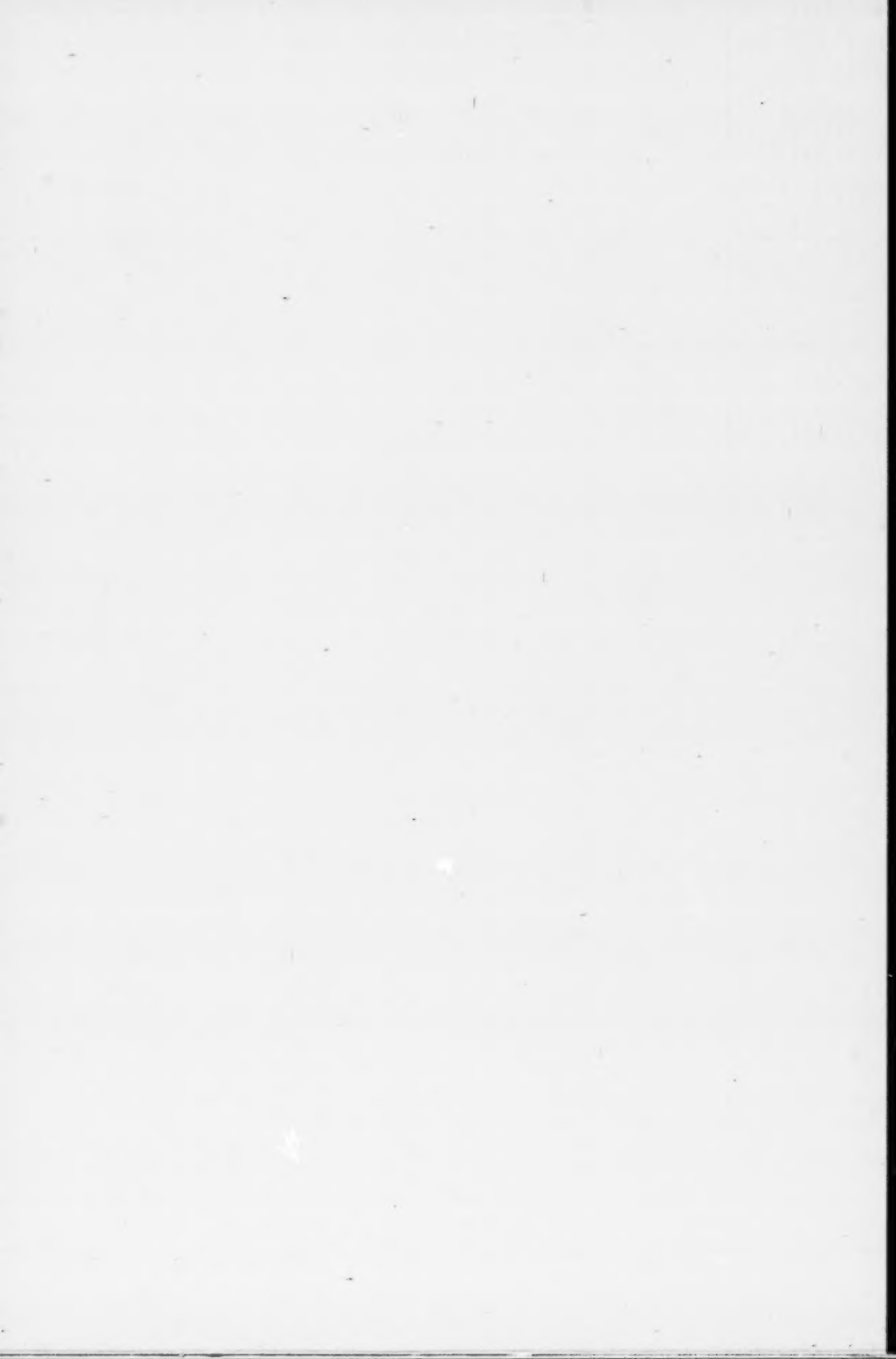
The motion is GRANTED, and the judgment of the district court is AFFIRMED.



APPENDIX-D

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a *capital*, or otherwise infamous crime, in less on a presentment or indictment of a Grand Jury except in cases arising in the land or naval or in the Militia, when in actual service in time of War or public danger nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation.



APPENDIX-E

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his Favor, and to have the Assistance of Counsel for his defense.



APPENDIX-F

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT ENFORCEMENT

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in

such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebel

APPENDIX-G
FEDERAL RULES OF CRIMINAL PROCEDURE
RULE 11

Rule 11. Pleas

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant.

Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel— and if necessary

have the court appoint counsel— at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(f) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charge offense or a

lesser or related offense, the plea agreement may specify that an attorney for the government will:

- (A) not bring, or will move to dismiss, other charges;
- (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
- (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

- (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.
- (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea

agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

- (A) inform the parties that the court rejects the plea agreement;
- (B) advise the defendant personally that the court is not required to follow the plea agreement and give the Defendant an opportunity to withdraw the plea; and
- (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorable toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea.

A defendant may withdraw plea of guilty or nolo contendere

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or inadmissibility of a Plea, Plea Discussion, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule

11(b) and (c).

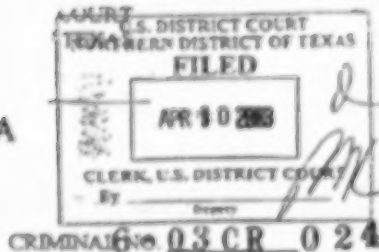
(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.



APPENDIX H
IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA

V.



J.D. CORTEZ (1)
LUGARDHA MAGANA MARTINEZ
also known as Luli Martinez(2)
ROBERT LESLIE RIVERA (3)
ANGEL MAGANA(4)

INDICTMENT

The Grand Jury charges: —

Introduction

At all time material to this indictment:

1. The Tom Green Community Action Council, Inc. (Community Action Council) was a private, non-profit corporation and organization which served Tom Green County, Texas, and surrounding counties. The Community Action Council assists citizens of those counties by administered by the Community Action Council was the Head Start Program.

2. The head Start Program was (is) a federal program

funded by public (federal) funds through the United States Department of Health and Human Services (HHS) The Head Start Program is a national program which provides comprehensive developmental services for America's low-income, pre-school children ages three to five and social services for their families. The Early Head Start Program expands the benefits of early childhood development to low-income families with children under three years of age and to pregnant women. The Community Action Council manages the Head Start Program and Early Head Start Program in the geographical area it covers operating approximately fifteen (15) Head Start Centers. At the beginning of each fiscal year the Community Action Council, in order to obtain funding for the Head Start and Early Head Start Programs, would submit a budget/request for funds to HHS, and Federal monies would then be provided to the Community Action Council to operate the Early Head Start and Head Start Programs. Specifically, for fiscal year 1998, the Community Action Council received in federal funds through HHS approximately \$2,795,416.00; \$2,784,537.00 for fiscal year 1999; \$3,699,808.00 for fiscal year 2000; \$4,091,668.00 for fiscal year 2001; and, \$4,179,633.00 for fiscal year 2002. In addition, the Community Action Council received from HHS federal funds for the Early Head Start Program of approximately \$968,691.00 in fiscal year 2000; \$1,144,625.00 in fiscal year 2001; and, \$923,254.00 in fiscal year 2002.

3. **J. D. Cortez**, defendant herein, was an agent, that is the Executive Director, of the Community Action Council. In addition, **J. D. Cortez** was also the president, director and registered agent of J&M Restaurant, Inc., doing business as *Henry 's Diner*, a Mexican food restaurant located at 3015 Sherwood Way, San Angelo, Texas.

4. Rodolfo "Rudy" Castaneda, not named as a defendant herein, owned and operated *Area Appliance*, a

small appliance business dealing primarily with residential appliance repair.

5. *A-Tex Supply* was a business that provided restaurant equipment, supplies and service to restaurants in the San Angelo area including *Henry's Diner*.

6. Jerry Jaques, not named as a defendant herein, was a general repair and renovation contractor and did repairs and renovations on Head Start facilities for the Community Action Council since approximately 1992. Elma Jaques was the wife of Jerry Jaques who assisted in his business by preparing invoices..

7. Ivan Havins III, not named as a defendant herein, was an employee of *Henry's Diner*.

8. Jesse Ocanipo, not named as a defendant herein, was a employee of *Henry's Diner*.

9. Vanessa Johnson, not named as a defendant herein, had been an employee of the Community Action Council and contracted with the Community Action Council as an independent contractor.

10. Michelle Ramirez Hernandez, not named as a defendant herein, was an agent, that is an employee, of the Community Action Council and had held several positions including the job as the Head Start Program "Family Services Specialist". The organizational chart for the Community Action Council also shows Michelle Ramirez Hernandez as the "Administrative Assistant" to the Community Action Council Director, **J.D.Cortez**.

11. **Lugardlia Magana Martinez**, also known as Luli Martinez, defendant herein, was an agent, that is an employee of the Community Action Council and was the Fiscal Officer/ Comptroller of the Community Action Council.

12. **Robert Leslie Rivera**, defendant herein, was a brother-in-law of defendant **Lugardha Magana Martinez**

13. **Angel Magana**, defendant herein, was the manager of the "Gentle Touch Auto Lube in San Angelo, Texas and is

the brother of defendant **Lugardha Magana Martinez**.

Schemes and Artifices to Defraud

14. Beginning in or about 1997, and continuing until on or about the date of this indictment, defendants **J. D. Cortez**, **Lugardha Magana Martinez**, **Robert Leslie Rivera**, and **Angel Magana** and others, both known and unknown to the Grand Jury, devised a variety of schemes and artifices to defraud the Community Action Council and HHS of approximately \$805,083.55. Those schemes and artifices to defraud include:

A. The Restaurant Scheme

15. As part of this scheme and artifice to defraud the defendant, **J. D. Cortez**, had equipment, supplies and service that were obtained for his restaurant, *Henry's Diner's* falsely charged as if the equipment, supplies and service had been provided to one of the Head Start centers.

16. It was further apart of this scheme and artifice to defraud that the defendant, **J. D. Cortez**, instructed Rodolfo "Rudy" Castaneda, owner of Area Appliance, and the owner of *A-Tex Supply* to submit fraudulent vouchers to the Community Action Council falsely showing that, between April 1, 2001, and November 2, 2002, approximately \$182,000.00 worth of equipment, supplies and services had been provided to various Head Start facilities when, in truth and fact, the equipment, supplies and services had been supplied to **J. D. Cortez'** restaurant *Henry's Diner*. Equipment paid for by fraudulently obtained Head Start funds that was installed and used at *Henry's Diner* includes a commercial charbroiler and exhaust hood, an electric steam table, a stainless steel dish table and rack, commercial blenders, a food processor, a potato peeler and a disposer.

17. It was further a part of this scheme and artifice to defraud that when the defendant, **J. D. Cortez**, became aware that some of these purchases were being questioned and that there might be a physical inspection of the Head Start centers, he instructed the owner of *A-Tex Supply* to install a charbroiler and exhaust hood identical to the one he had fraudulently obtained for Henry's Diner, at the Lincoln Head Start Center. At the instruction of **J. D. Cortez**, false; and fraudulent invoices were also submitted to the Community Action Council to pay for these items.

Count 1

(Theft or Embezzlement Concerning Programs Receiving Federal Funds and Aiding and Abetting)
•(18 U.S.C § 666(a) and 2)

A. The Grand Jury realleges paragraphs one through seventeen set forth above.

B. Between on or about April 1, 2001 and on or about the date of this indictment, in the San Angelo Division of the Northern District of Texas, the defendant, **J. D. Cortez**, did knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, to wit, funds in the amount of approximately \$182,471.84, which funds were owned by and under the care, custody, and control of the Tom Green County Community Action Council, an agency receiving funds from the United States Department of Health and Human Services to administer and operate the Head Start Program and Early Headstart Program.

In violation of Title 18, United States Code, Section § 666(a) and 2.

B. The Jaques Phony Repair Scheme

18. As a part of this scheme and artifice to defraud, the defendant, **J. D. Cortez**, instructed Jerry Jaques and Elma Jaques to make, or cause to be made, and submitted to the Community Action Council false invoices, fraudulently representing that they were for repairs and/or renovations to various Head Start facilities when, in truth and fact, the invoices had been falsely inflated or the work had not been done at all.

19. It was further a part of this scheme and artifice to defraud that the defendant, **J. D. Cortez**, between 1997 and November 1, 2002, instructed Jerry Jaques to falsely inflate his invoices for repairs and renovations for Head Start facilities and, in some instances, to submit invoices for repairs and renovations not made, fraudulently causing the Community Action Council to pay approximately \$268,000.000 to Jerry Jaques for repairs and renovations not done or whose costs were falsely inflated.

20. It was further a part of the scheme and artifice to defraud that, initially, Jerry Jaques would give the defendant, **J. D. Cortez**, one half of the fraudulently obtained payments from the Community Action Council. These payments to **J. D. Cortez** were usually made in cash by Emma Jaques at *Henry's Diner*. After some time, the split of the fraudulent proceeds of this scheme to defraud was changed from a 50-50 split to Jerry Jaques keeping two thirds and **J. D. Cortez** getting one third. This was done because Jerry Jaques was paying income taxes on the entire amount whereas **J. P. Cortez** was not reporting to the Internal Revenue Service his receipt of the income from this fraud.

21. It was further a part of the scheme and artifice to defraud while Elma Jaques normally gave the defendant, **J. D. Cortez**, cash, on several occasions when she did not have sufficient cash, **J. D. Cortez** instructed her to write checks, one time instructing her to write a \$5,000.00 check payable to an employee of *Henry's Diner*, Ivan Havins III, and another

time to write a \$3000.00 check and Havins name was later filled in. Both of these checks were cashed by Havins and the monies given to **J. D Cortez**.

22. It was further a part of the scheme and artifice to defraud and attempt to obstruct justice when, knowing that the Federal Bureau of Investigation was investigating the embezzlement and theft of Community Action Council and HHS funds, **J. D. Cortez** contacted Jerry Jaques and told him that if he (Jaques) was interviewed by the FBI and asked about the checks to Havins, Jaques should falsely tell the FBI agent that the checks to Havins were loans made by Jaques to Havins.

Count 2

(Theft or Embezzlement Concerning Programs Receiving Federal Funds and Aiding and Abetting)
(18 U.S.C. § 666(a) and 2)

A. The Grand Jury realleges paragraphs one through seventeen and eighteen through twenty two set forth above.

B. Between on or about March 1, 2000, and on or about the date of this indictment, in the San Angelo

Division of the Northern District of Texas, the defendant, **J. D. Cortez**, did knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, to wit, funds in the amount of approximately \$268,000.00, which funds were owned by and under the care, custody, and control of the Tom Green Community Action Council, an agency receiving funds from the United States Department of Health and Human Services to administer and operate the Head Start Program and Early Headstart Program.

In violation of Title 18. United States Code, Sections 666(a) and 2.

Count 3**(Tampering with a Witness by Misleading Conduct)
(18 U.S.C. 1512(b)(3))**

On or about September 29, 2002, in the San Angelo Division of the Northern District of Texas, the defendant, **J. D. Cortez**, did knowingly attempt to corruptly persuade and engage in misleading conduct toward Jerry Jaques by telling him that if he was interviewed by the Federal Bureau of Investigation about checks payable to Ivan Havins III, he should tell them that those were loans Jaques had made to Havins, with the intent to hinder, delay and prevent the communication to agents of the Federal Bureau of Investigation of information relating to the commission and possible commission of a Federal offense, namely Federal Funds in violation of Title 18, United States Code, Section 666(a).

In violation of Title 18, United States Code, Sections 1512(b)(3) and 2.

C. The Ocampo False Billing Scheme

23. Beginning in or about April 2001, and continuing until on or about September 2001, the defendant, **J D Cortez**, devised a scheme and artifice to defraud the Community Action Council and HHS by causing five checks totaling approximately \$38,337.36 to be issued by Community Action Council to Jesse Ocampo an employee at *Henry's Diner*, and then instructing Ocampo to cash the checks and give the proceeds to him (**J. D. Cortez**).

24. As part of this scheme and artifice to defraud the defendant, **J. D Cortez**, would make or cause to be made invoices, fraudulently representing that they were from Jesse Ocampo for the purchase of supplies for the Head Start

Program when, in truth and fact, Ocampo had purchase no supplies and submitted no invoices to the Community Action Council. The defendant, **J. D. Cortez**, would also make, or cause to be made, false Community Action Council documents supporting the payments to Ocampo.

25. It was further a part of the scheme and artifice to defraud and attempt to obstruct justice when, knowing that the Federal Bureau of Investigation was investigating the embezzlement and theft of Community Action Council and HHS funds, **J.D. Cortez** contacted Jesses Ocampo and told him that if he (Ocampo) was interviewed by the FBI and asked about the checks to Ocampo, he should falsely tell the FBI agents that he (Ocampo) had gone to Mexico and picked up school supplies and toys which he had sold to the Head Start program.

Count 4

(Theft or Embezzlement Concerning Programs Receiving Federal Funds and Aiding and Abetting)

(18 U.S.C. § 666(a) and 2)

A. The Grand Jury realleges paragraphs one through seventeen and twenty three through twenty five set forth above.

B. Between on or about May 1, 2001, and on or about the date of this indictment, in the San Angelo Division of the Northern District of Texas, the defendant, **J. D. Cortez**, did knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, to wit, funds in the amount of approximately \$38,337.36, which funds were owned by and under the care, custody, and control of the Tom Green County Community Action Council, an agency receiving funds from the United States Department of Health

and Human Services to administer and operate the Head Start Program and Early Headstart Program.

In violation of Title 18, United States Code, Sections 666(a) and 2.

Count 5

**(Tampering with a Witness by Misleading Conduct)
(18 U.S.C. § 1512(b)(3))**

On or about after June 2002, in the San Angelo Division of the Northern District of Texas, the defendant, **J. D. Cortez**, did knowingly attempt to corruptly persuade and engage in misleading conduct toward Jesse Ocampo by telling him that if he was interviewed by the Federal Bureau of Investigation he should tell them that he had gone to Mexico and purchased supplies for the Community Action Council Head Start Program with the intent to binder, delay and prevent the communication to agents of the Federal Bureau of Investigation of information relating to the commission and possible commission of a Federal offense, namely, Theft or Embezzlement Concerning Programs Receiving Federal Funds in violation of Title 18, United States Code, Section 666(a).

In violation of Title 18, United States Code, Sections 1512(b)(3) and 2..

D. The Johnson False Billing Scheme

26. Beginning in or about March, 2001, and continuing until on or about November, 2002, the defendant, **J. D. Cortez**, devised a scheme and artifice to defraud the Community Action Council and HHS by causing nine checks totaling approximately \$51,013 to be issued by Community Action Council to Vanessa Johnson.

27. It was further a part of this scheme and artifice to

defraud that the defendant, **J. D. Cortez**, instructed Vanessa Johnson, an independent contractor, to falsely inflate her invoices for research on grants, and, in some instances, to submit totally false invoices for such research and also submit invoices for supplies to the Head Start program, when in truth and fact, the research was not done and no supplies have been furnished to the Head Start Program, the said false and fraudulent invoices causing the Community Action Council to pay approximately \$51,013 to Vanessa Johnson.

28. As part of this scheme and artifice to defraud, Vanessa Johnson, at the direction of the defendant, **J.D. Cortez**, would make or cause to be made and submitted to the Community Action Council false invoices, fraudulently representing that they were for the purchase of supplies for the Head Start Program when in truth and fact, Johnson had purchased no supplies. The defendant, **J. D. Cortez**, would also make, or cause to be made, false Community Action Council documents supporting the payments to Johnson.

29. It was further a part of the scheme and artifice to defraud that, initially, Vanessa Johnson would give the defendant, **J. D. Cortez**, one half of the fraudulently obtained payments from the Community Action Council. Usually, these payments to **J. D. Cortez** were made in cash by Vanessa Johnson at *Henry's Diner*. After some time, **J. D. Cortez** instructed Vanessa Johnson that the split of the fraudulent proceeds of this scheme to defraud was to be changed from the 50-50 split to a four way split with equal amounts going to Vanessa Johnson, **J.D. Cortez**, **Lugardha Magana Martinez**, also known as Luli Martinez, defendant, and Michelle Hernandez, another Community Action Council employee. At the instruction of **J. D. Cortez**, Vanessa Johnson would cash the fraudulently obtained Community Action Council check, divide the proceeds four ways and give **Lugardha Magana Martinez** the cash for herself, **J. D. Cortez** and Michelle Hernandez.

Count 6

(Theft or Embezzlement Concerning Programs Receiving
Federal Funds and Aiding and Abetting)
(18 U.S.C. § 666(a) and 2)

A. The (Grand Jury realleges paragraphs one through seventeen and twenty six through twenty nine set forth above.

B. Between on or about April 1, 2001, and on or about the date of this indictment, in the Sari Angelo Division of the Northern District of Texas, the defendants, **J. D. Cortez** and **Lugardha Magana Martinez**, did knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, to wit, funds in the amount of approximately \$51,013.00, which funds were owned by and under the care, custody, and control of the Tom Green County Community Action Council, an agency receiving funds from the United States Department of Health and Human Services to administer and operate the Head Start Program and Early Headstart Program.

In violation of Title 18, United States Code, Sections 666(a) and 2.

E. The Rivera False Billing Scheme

30. As a part of this scheme and artifice to defraud, the defendant **Lugardha Magana Martinez** instructed defendant **Robert Leslie Rivera** to make or cause to be made and submitted to the Community Action Council a false invoice, fraudulently representing that it was for repairs and/or renovations to the Lincoln Head Start facility when, in truth and fact, the invoice had been falsely inflated or the work had not been done at all, thereby causing the Community Action Council to issue a check in the amount of

\$3,529.83 to **Robert Leslie Rivera**.

31. It was further a part of this scheme and artifice to defraud, that the defendant **Lugardha Magana Martinez** instructed defendant **Robert Leslie Rivera** to make or cause to be made and submitted to the Community Action Council a false invoice, fraudulently representing that it was for the purchase of sixteen computers when, in truth and fact, **Robert Leslie Rivera** had not built and sold and delivered to various Head Start facilities sixteen computers, thereby causing the Community Action Council to issue a check in the amount of \$55,998.24 to **Robert Leslie Rivera**.

32. The defendant **Lugardha Magana Martinez** would also make, or cause to be made, fake Community Action Council documents supporting the payments to **Robert Leslie Rivera**.

33. It was further a part of the scheme and artifice to defraud that the defendant **Robert Leslie Rivera**, when he appeared before the Federal Grand Jury investigating the embezzlement and theft of funds from the Community Action Council and HHS, did commit perjury and did lie when questioned about the invoices described above and payments he received from the Community Action Council.

Count 7

**(Theft or Embezzlement Concerning Programs Receiving
Federal Funds and Aiding and Abetting)**
(18 U.S.C. § 666(a) and 2)

A. The Grand Jury realleges paragraphs one through seventeen and thirty through thirty three set forth above.

B. Between on or about June 1, 2001, and on or about the date of this indictment, in the San Angelo Division of the Northern District of Texas, the defendants, **Lugardha Magana Martinez** and **Robert Leslie Rivera**, did

knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, to wit, funds in the amount of approximately \$59,528.07, which funds were owned by and under the care, custody, and control of the Tom Green County Community Action Council, an agency receiving funds from the United States Department of Health and Human Services to administer and operate the Head Start Program and Early Headstart Program.

In violation of Title 18, United States Code, Sections 666(a) and 2.

Count 8

(False Declarations Before Grand Jury) (18 U.S.C. §1623)

A. The Grand Jury realleges paragraphs one through seventeen and thirty through thirty three set forth above.

B. On or about November 19, 2002, in the Lubbock Division of the Northern District of Texas, the defendant **Robert Leslie Rivera**, while under oath and testifying in a proceeding before the Federal Grand Jury empaneled July 17, 2001, a Grand Jury of the United States in the Northern District of Texas, knowingly did make a false material declaration, that is to say:

1. At the time and place aforesaid the grand jury was conducting an investigation to determine whether violations of Title 18, United States Code, Section 666, Theft or Embezzlement Concerning Programs Receiving Federal Funds, had been committed, and to identify the persons who had committed, caused the commission of, and conspired to commit such violations. It was material to the said investigation that the grand jury ascertain why **Robert Leslie Rivera** was being issued checks from the Community Action Council during 2001 and whether **Robert Leslie Rivera** built, sold and delivered sixteen computers to the Community

Action Council for the Head Start program and whether **Robert Leslie Rivera** perform work for the Community Action Council at the Lincoln Junior High, San Angelo, Texas.

II. At the time and place alleged,, the defendant **Robert Leslie Rivera**, appearing as a witness under oath at a proceeding before the grand jury, knowingly made the following declaration in response to questions with respect to the material matter alleged in paragraph I above as follows:

A. Testimony concerning computers

"Q. Was there a time that you did you ever do any work for the Community Action Council or Head Start in Tom Green County?"

"A. Yes"

"Q. What did you do for them?"

"A. *I built them some computers.*"

"A. *I built some computers for them. I worked on the school*"

"Q. How many computers did you build?"

"A. *About 16 of them.*"

"Q. And you had a conversation with Luli about needing work where she said they needed 16 computers?"

"A. *Right. And that is why the check was ready when I got moved back on the 1st.*"

"Q. Did you build 16 computers for Community Action Council, Tom Green County?"

"A. *Yes, I did.*"

"Q. Did you deliver those computers?"

"A. *I delivered them there. I never delivered them to the other places afterwards because I was never called back in.*"

"Q. When you say you delivered them there, where are you talking about?"

"A. *To the Tom Green County Community Action Center?*"

"Q. At their offices, where Luli has her office?"

"A. *Right.*"

"Q. And the reason that the cost on these computers was almost \$3,500 is because they were also buying your maintenance?"

"A. *Right.*"

"Q. How were you going to perform that maintenance if you were living in Corpus Christi?"

"A. *Well I would come down. I would come down frequently to San Angelo to visit.*"

B. Testimony concerning Lincoln Junior High

"Q. What exactly did you do?"

"A. *I measured out the schools and the rooms in the half of the building that we were going to use.*"

"Q. When you say you measure out, what are you talking about?"

"A. *We had to measure out the square footage and find how much space they needed per kid and which walls we were going to knock down.*"

"Q. Were you doing this by yourself or were you aided by Jerry Jaques in this?"

"A. *Some of it, I did by myself And some of it, I was with Jerry Jaques.*"

"Q. And did you do it all in one day?"

"A. *No, sir.*"

"Q. How many days were you out there?"

"A. *About a week and a half.*"

"Q. How did you get in?"

"A. *I had a key.*"

"Q. How did you get a key?"

"A. *Luli gave it to me.*"

"Q. Well, — okay. There was 10 day-- how many of those 10 days would Jerry Jaques also have been there?"

"A. *Probably about six or seven.*"

"Q. And during that 10 day period, you were measuring classrooms?"

"A. *Yeah. And I checked out the structure and checked out the air conditioning work, too.*"

"Q. Any part of that time you were there with Jerry Jaques?"

"A. *Yes, sir.*"

"Q. Did Jerry Jaques do any work?"

"A. *He was helping me move all the stuff so we could look at the ducting. And he was telling me exactly what he needed to be done and what he was going to do and what I was going to do.*"

III. The aforesaid italicized testimony of the defendant **Robert Leslie Rivera**, as he then and there well knew and believed, was false in that, he knew he had not built and delivered sixteen computers to the Community Action Council and he had not worked for approximately ten days at the Lincoln Junior High.

All in violation of Title 18, United States Code, Sections 1623 and 2.

F. The Magana False Billing Scheme

34. As a part of this scheme and artifice to defraud the defendant **Lugardha Magana Martinez** instructed defendant **Angel Magana** to make or cause to be made and submitted to the Community Action Council false invoices, fraudulently representing that it was for repairs and/or renovations to various Head Start facilities when, in truth and fact, the invoices had been falsely inflated or the work had not been done at all, thereby causing the Community Action Council to issue five checks totaling approximately \$78,738.28 to **Angel Magana**.

35. It was further a part of this scheme and artifice to defraud, that the defendant **Lugardha Magana Martinez** instructed defendant **Angel Magana** to make or cause to be made and submitted to the Community Action Council approximately nine false invoices, fraudulently representing that they were for repairs made at various Head Start facilities when, in truth and fact, **Angel Magana** had not made any repairs to the said Head Start facilities.

36. The defendant **Lugardha Magana Martinez** would also make, or cause to be made, false Community Action Council documents supporting the payments to **Angel Magana**.

37. It was further a part of the scheme and artifice to defraud and attempt to obstruct justice when knowing that the

Federal Bureau of Investigation was investigating the embezzlement and theft of Community Action Council and HHS funds, **Angel Magana** was instructed that when interviewed by the FBI and asked about the invoices for repair work, he should (and did) falsely tell the FBI that he (**Angel Magana**) had done the repairs and he had been sub-contracted for the repairs by Jerry Jaques.

Count 9

(Theft or Embezzlement Concerning Programs Receiving Federal Funds and Aiding and Abetting)
(18 U.S.C. § 666(a) and 2)

A. The Grand Jury realleges paragraphs one through seventeen and thirty four through thirty seven set forth above.

B. Between on or about March 1, 2001, and on or about the date of this indictment, in the San Angelo Division of the Northern District of Texas, the defendants, **Lugardha Magana Martinez** and **Angel Magana**, did knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, to wit, funds in the amount of approximately \$78,738.25, which funds were owned by and under the care, custody, and control of the Tom Green County Community Action Council, an agency receiving funds from the United States Department of Health and Human Services to administer and operate the Head Start Program and Early Headstart Program.

In violation of Title 18, United States Code, Sections 666(a) and 2.

G. The Lincoln Junior High Fire Scam

38. It was a part of this scheme and artifice to defraud HHS that, after a fire at the Lincoln Junior High School (Lincoln) in San Angelo, Texas, **J. D. Cortex** directed

employees of the Community Action Council to prepare false and fictitious statements and submit them to HHS stating that repairs and renovations for Head Start classrooms had been made to the part of Lincoln that burned and that Head Start supplies had also been destroyed in the fire.

39. It was further a part of this scheme and artifice to defraud that, at the direction of **J. D. Cortez** a one-time funding application for \$75,000.00 was submitted to HHS falsely and fraudulently representing that materials and supplies in the amount of \$21,062.00 had been completely destroyed in the fire and that repairs had been made to the building totaling \$53,938.00, when, in truth and fact, no repairs had been made to the building and no materials or supplies had been destroyed.

40. It was further a part of this scheme and artifice to defraud that, at the direction of **J. D. Cortez**, an additional application for \$50,000.00 was submitted to HHS falsely and fraudulently representing that an additional \$50,000 was needed for supplies and repairs related to the fire..

41. Based on the false and fictitious representations and statements submitted at **J. D. Cortez's** direction, HHS made additional payments to the Community Action Council totaling \$125,000.

Count 10

(Theft or Embezzlement of Public
Monies and Aiding and Abetting)
(18 U.S.C. § 641 and 2)

A. The Grand Jury realleges paragraphs one through seventeen and thirty eight through forty one set forth above.

B. Between on or about August 1, 2001, and on or about the date of this indictment, in the San Angelo Division of the Northern District of Texas, the defendant, **J. D.**

Cortez, did knowingly embezzle, steal, purloin and knowing convert to his own use and use of another monies valued at \$1,000 or more to wit, funds in the amount of approximately \$125,000.00, which funds were owned by and under the care, custody, and control the United States Department of Health and Human Services to fund and operate the Head Start Program and Early Headstart Program.

In violation of Title 18, United States Code, Sections 641 and 2.

A True Bill,

"s/ Eunice Stafford "
Foreman

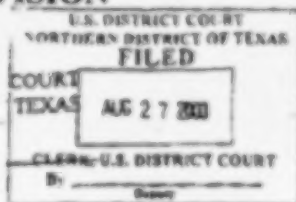
JANE J. BOYLE
UNITED STATES ATTORNEY
"s/ Roger L. McRobert "
Roger L. McRobert
Assistant United States Attorney
Texas State Bar No. 3857000
1205 Texas Avenue, 7th Floor
Lubbock, Texas 79401
Tel: 806.472.7351
Fax: 806.472.7394



APPENDIX-I
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA
v.

JUAN DOMINGO CORTEZ (1)
also known as J.D. Cortez



6-03CR0024 C
CRIMINAL NO.
(Superseding Indictment returned
April 10, 2003)

INFORMATION

The United States Attorney charges:

Introduction

At all time material to this information:

1. The Tom Green Community Action Council, Inc. (Community Action Council) was a private, non-profit corporation and organization administering various federal and state assistance programs which served Tom Green County, Texas, and surrounding counties.
2. The Head Start Program and Early Head Start Program are federal programs funded by public (federal) funds through the United States Department of Health and Human Services (HHS). The Community Action Council obtained federal funding to operate the Head Start and Early Head Start Programs through HHS in amounts exceeding \$10,000 in each of the years 2000, 2001 and 2002.
3. **Juan Domingo Cortez**, also known as and hereinafter referred to as **J. D. Cortez**, defendant herein, was an agent, that is the Executive Director, of the Community

Action Council. In addition, **J. D. Cortez** was also the president, director and registered agent of J&M Restaurant, Inc., doing business as *Henry 's Diner*, a Mexican food restaurant located at 3015 Sherwood Way, San Angelo, Texas.

Schemes and Artifices to Defraud

4. Beginning in or about 1997, and continuing until on or about June 30, 2002, defendant **J. D. Cortez** and others devised a variety of schemes and artifices to defraud the Community Action Council and HHS of approximately \$805,083.55. Those schemes and artifices to defraud include:

A. The Restaurant Scheme

5. As part of this scheme and artifice to defraud the defendant, **J. D. Cortez**, caused fraudulent vouchers to be submitted to the Community Action Council falsely showing that, between April 1, 2001, and November 1, 2002, approximately \$182,000.00 worth of equipment, supplies and services had been provided to various Head Start facilities when, in truth and fact, the equipment, supplies and services had been supplied to **J. D. Cortez**' restaurant *Henry 's Diner*.

B. The Jaques Phony Repair Scheme

6. As a part of this scheme and artifice to defraud, the defendant, **J. D. Cortez**, between 1997 and November 1, 2002, made or caused to be made falsely inflated invoices for repairs and renovations for Head Start facilities and, in some instances, fraudulent invoices for repairs and renovations not made, fraudulently causing the Community Action Council to pay approximately \$268,000.00 for repairs and renovations not done or whose costs were falsely inflated.

C. The Ocampo False Billing Scheme

7. Beginning in or about April 2001, and continuing until on or about September 2001, the defendant, **J. D. Cortez**, devised a scheme and artifice to defraud the Community Action Council and HHS of approximately \$38,337.36 by making, or causing to be made, and submitted to the Community Action Council false invoices, fraudulently representing that they were from Jesse Ocampo, allegedly for the purchase of supplies for the Head Start Program when, in truth and fact, Ocampo had purchased no supplies and submitted no invoices to the Community Action Council.

D. The Johnson False Billing Scheme

8. Beginning in or about March, 2001, and continuing until on or about November, 2002, **J. D. Cortez** defendant, devised a scheme and artifice to defraud the Community Action Council and HHS by making or causing to be made and submitted false and fraudulent invoices for services and for the purchase of supplies for the Head Start Program, when in truth and fact, the services were not done and no supplies have been purchased for the Head Start Program, the said false and fraudulent invoices causing the Community Action Council to pay approximately \$51,013 to Vanessa Johnson.

E. The Rivera False Billing Scheme

9. As a part of this scheme and artifice to defraud, between March 1, 2001 and June 30, 2001, defendant **J. D. Cortez** made or caused to be made and submitted to the Community Action Council false invoices fraudulently representing that they were for repairs at a proposed Head Start facility and for the purchase and delivery of sixteen computers when, in truth and fact, the invoices for the repair

work had been falsely inflated or the work had not been done at all and sixteen computers had not been purchased and delivered, thereby causing the Community Action Council to pay approximately \$59,528.07 to Robert Leslie Rivera

F. The Magana False Billing Scheme

10. As a part of this scheme and artifice to defraud, between February 1, 2001 and May 31, 2001, the defendant **J.D. Cortez** made or caused to be made and submitted to the Community Action Council false invoices, fraudulently representing that they were for repairs and/or renovations to various Head Start facilities made by Angel Magana, when, in truth and fact, the invoices had been falsely inflated or the work had not been done at all, thereby causing the Community Action Council to pay Angel Magana approximately \$78,738.28.

G. The Lincoln Junior High Fire Scam

11. It was a part of this scheme and artifice to defraud HHS that, after a fire at the Lincoln Junior High School (Lincoln) in San Angelo, Texas, **J. D. Cortez** directed employees of the Community Action Council to prepare false and fictitious statements and submit them to HHS stating that repairs and renovations for Head Start classrooms had been made to the part of Lincoln that burned and that Head Start supplies had also been destroyed in the fire and based on these false and fictitious representations and statements submitted at **J. D. Cortez's** direction, HHS made additional payments to the Community Action Council totaling \$125,000.

Count I**(Theft or Embezzlement Concerning Programs Receiving
Federal Funds and Aiding and Abetting)
(18 U.S.C. § 666(a) and 2)**

A. Paragraphs one through eleven set forth above are realleged and incorporated herein.

B. Between on or about March 1, 2000, and on or about June 30, 2002, in the San Angelo Division of the Northern District of Texas, the defendant, **J. D. Cortez**, did knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, to wit, funds in the amount of approximately \$805,083.55, which funds were owned by and under the care, custody, and control of the Tom Green County Community Action Council, an agency receiving funds from the United States Department of Health and Human Services to administer and operate the Head Start Program and Early Head Start Program.

In violation of Title 18, United States Code, Sections 666(a) and 2.

JANE I BOYLE
UNITED STATES ATTORNEY

"S/



Roger L. McRobert
Assistant United States Attorney
Texas State Bar No. 3857000
1205 Texas Avenue, 7th Floor
Lubbock, Texas 79401
Tel: 806.472.7351
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APPENDIX J
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA

V. **CRIMINAL NO.** _____
 (Supersedes Indictment returned
 April 10, 2003)

JUAN DOMINGO CORTEZ (I)
also known as JD, Cortez

PLEA AGREEMENT

Juan Domingo Cortez, also known as J.D. Cortez, Gerald H.. Goldstein and Van G. Hilley, the defendant's attorneys, and the United States of America (the government), agree as follows:

1. **Rights of the defendant:** J.D. Cortez understands that he has the rights
 - a. to plead not guilty;
 - b. to have a trial by jury;
 - c. to have his guilt proven beyond a reasonable doubt;
 - d. to confront and cross-examine witnesses and to call witnesses in his defense; and

c. against compelled self-incrimination.

2. **Waiver of rights and plea of guilty:** J. D. Cortez waives these rights and pleads guilty to the offense alleged in the one count superceding Information, charging a violation of 18 U.S.C. §666(a) and 2, that is, Theft or Embezzlement Concerning Programs Receiving Federal Funds and Aiding and Abetting. J.D. Cortez understands the nature and elements of the crime to which he is pleading guilty, and agrees that the factual resume he has signed is true and will be submitted as evidence.

3. **Sentence:** The maximum penalties the Court can impose include:

a. imprisonment for a period not to exceed ten (10) years;

b. a fine not to exceed \$250,000,

c. a mandatory term of supervised release of not more than three (3) years, which must follow any term of imprisonment. If J.D. Cortez violates the conditions of supervised release, he could be imprisoned for the entire term of supervised release;

d. a mandatory special assessment \$100;

e. restitution to victims or to the community, which may be mandatory under the law, and which J.D. Cortez agrees may include restitution arising from all relevant conduct, not limited to that arising from the offense of conviction alone; and

f. costs of incarceration and supervision

4. **Sentencing guidelines:** The sentence in this case will be imposed by the Court pursuant to the United States Sentencing Guidelines. J.D. Cortez has reviewed the application of the guidelines with his attorney, but understands no one can predict with certainty what guideline range will apply in this case until after a presentence investigation has been completed and the Court has ruled on the results of that investigation. JD. Cortez will not be allowed to withdraw his plea if the applicable guideline range is higher than expected, or if the Court departs from the applicable guideline range. Both parties agree and stipulate that the adjustment for "vulnerable victim" under §3A1.1 (b)(1) does not apply and the adjustment for "manager/supervisor" under &3B1.1(b) does not apply.

5. **Court's discretion:** J.D. Cortez understands that this plea agreement does not create a right to be sentenced within, or below, any particular guideline range, and fully understands that determination of the guideline range, as well as the actual sentence imposed (so long as it is within the statutory maximum), are solely in the discretion of the Court,

6. **Mandatory special assessment:** Prior to sentencing, J.D. Cortez agrees to pay to the U.S. District Clerk the amount of \$100 in satisfaction of the mandatory special assessment in this case.

7. **Defendant's cooperation:** J.D. Cortez shall cooperate with the government by giving truthful and complete information and/or testimony concerning his participation in the offense of conviction and knowledge of criminal activities. Upon demand, J.D. Cortez shall

submit a personal financial statement under oath and submit to interviews by the government and the U.S. Probation Office regarding his capacity to satisfy any fines or restitution. The government will advise the Court of the extent of J.D. Cortez's cooperation. J.D. Cortez agrees that the total loss amount is \$805,083.55 that he owes restitution in the amount of \$805,083.55 to the United States Department of Health and Human Services (HHS). The defendant J.D. Cortez agrees to assist in the locating and recovery of all such forfeitable property and/or proceeds and to assist in its disposition, with the proceeds or property being returned to the defrauded party.

8. J.D. Cortez, pursuant to 42 U.S.C. & 1320a-7(b)(7), agrees to be excluded under that statutory provision from participation in Medicare, Medicaid and all other Federal health care programs as defined in 42 U.S.C. & 1320a7b(f), for the duration of J.D. Cortez's lifetime. Such exclusion shall have national effect and shall also apply to all other Federal procurement and non-procurement programs. J.D. Cortez waives any further notice of the exclusion and agrees not to contest such exclusion either administratively or in any State or Federal court. Federal health care programs shall not reimburse J.D. Cortez or anyone else for items, including administrative and management services, furnished, ordered or prescribed by J.D. Cortez during the exclusion in any capacity, or through any entity he controls, i.e. through a direct or indirect ownership interest of five percent (5%) or more or as an officer, agent, or managing employee (as defined by 42 U.S.C. § 1320a-5(b)). If J.D. Cortez submits claims or causes claims to be submitted for services furnished during the exclusion, J.D. Cortez is subject to criminal

prosecution the imposition of civil monetary penalties and assessments, and an additional period of exclusion (see 42 U.S.C. § 1320a-7b and 42 U.S.C. § 1320a-7a). J.D. Cortez further agrees to hold the Federal health care programs and all Federal beneficiaries and/or sponsors, harmless from any financial responsibility for services furnished, ordered or prescribed to such beneficiaries or sponsors after the effective date of the exclusion. This exclusion shall be effective upon the execution date of this Plea Agreement.

9. **Government's agreement:** The government will not bring any additional charges against J.D. Cortez based upon the conduct underlying and related to J.D. Cortez's plea of guilty. The government will dismiss, after sentencing, any remaining charges in the pending indictment, that being Counts 1,2,3,4,5,6,and 10. The United States will inform the court and the Probation Office that J.D. Cortez' decision to plead guilty was timely and will file the appropriate motion under USSG section 3E1. 1(b) requesting that J.D. Cortez receive an additional one-level reduction in his offense level. This agreement is limited to the United States Attorney's Office for the Northern District of Texas and does not bind any other federal, state, or local prosecuting authorities, nor does it prohibit any civil or administrative proceeding against J.D. Cortez or any properly.

10. **Violation of agreement:** J.D. Cortez understands that if he violates any provision of this agreement, or if his guilty plea is vacated or withdrawn, the government. will be free from any obligations of the agreement and free to prosecute J.D. Cortez for all offenses of which it has knowledge. In such event, J.D. Cortez waives any objections based upon delay in prosecution. If the plea is vacated or withdrawn for any reason other than a finding that it was involuntary, J.D. Cortez also waives objection to the use against him of any

information or statements he has provided to the government, and any resulting leads.

11. **Voluntary plea:** This plea of guilty is freely and voluntarily made and is not the result of force or threats, or of promises apart from those set forth in this plea agreement. There have been no guarantees or promises from anyone as to what sentence the Court will impose.

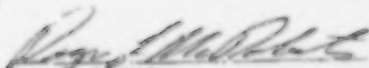
12. **Waiver of right to appeal or otherwise challenge sentence:** J.D. Cortez waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. He further waives his right to contest his conviction and sentence in any collateral proceeding, including proceeding under 28 U.S.C. § 2241 and 28 U.S.C. & 2255, on any ground. J.D. Cortez, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, (ii) an upward departure from the guideline range deemed applicable by the district court, or (iii) an arithmetic error at sentencing, and (b) to challenge the voluntariness of his plea of guilty or this waiver.

13. **Representation of counsel:** J.D. Cortez has thoroughly reviewed all legal and factual aspects of this case with his lawyer and is fully satisfied with that lawyer's legal representation. J.D. Cortez has received from his lawyer explanations satisfactory to him concerning each paragraph of this plea agreement, each of his rights affected by this agreement, and the alternatives available to him other than entering into this agreement. Because he concedes that he is guilty, and after conferring with his lawyer, J.D. Cortez has concluded that it is in his best interest to enter into this plea agreement and all its terms, rather than to proceed to trial in this case.

14. **Entirety of agreement:** This document is a complete statement of the parties' agreement and may not be modified unless the modification is in writing and signed by all parties.

AGREED TO AND SIGNED this 27th day of August, 2003.

"S/



"

Roger T. McRoberts
Assistant United States Attorney
Texas State Bar No. 3857000
1205 Texas Avenue, 7th Floor
Lubbock, Texas 79401
Tel: 806.472.7351
Fax: 806.472.7394

I have read (or had read to me) this Plea Agreement and have carefully reviewed every part of it with my attorney. I fully understand it and voluntarily agree to it.

Juan Domingo Cortez
also known as J.D. Cortez

Date

I am the defendant's counsel. I have carefully reviewed every part of this Plea Agreement with the defendant. To my knowledge and belief, my client's decision to enter into this Plea Agreement is an informed and voluntary one.

Gerald H. Goldstein
Attorney for Defendant

Date

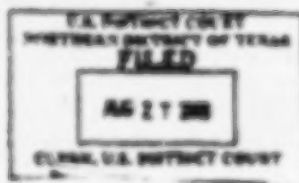
Van O. Hilley
Attorney for Defendant

Date



APPENDIX-K

FACTUAL RESUME



UNITED STATES OF AMERICA v JUAN DOMINGO
CORTEZ, a/k/a, J.D. Cortez, 6:03-CR-024-C SAN
ANGELO DIVISION- NORTHERN DISTRICT OF TEXAS

INFORMATION:

TO BE ARRAIGNED ON ONE COUNT INFORMATION

Charging a violation of Title 18, United States Code, sections
666(a) and 2, Theft or Embezzlement Concerning Programs
Receiving Federal Funds and Aiding and Abetting.

MAXIMUM PENALTY

A term of imprisonment of not more than ten (10) years, a
fine of not more than \$250,000. or both imprisonment and
fine, plus 3 years Supervised Release and restitution may be
ordered by the Court.

MANDATORY ASSESSMENT:

A mandatory special assessment of one hundred (\$100.00)
dollars.

PLEA AGREEMENT:

As set forth In the Plea Agreement attached hereto and
incorporated herein.

ELEMENTS OF THE OFFENSE

Title 18, United States Code, Section 666(a), makes it a crime
for anyone to embezzle, steal, obtain by fraud and

intentionally misapply property valued at \$5,000 or more, from a program receiving Federal funds, as charged in the Information.

The government must prove each of the following beyond a reasonable doubt:

First: **Juan Domingo Cortez**, hereinafter, **J.D. Cortez**, was an agent of the Tom Green Community Action Council, Inc.;

Second: during the period between on or about March 1, 2000, and on or about June 30, 2002, **J.D. Cortez** did knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, that is funds in the approximate amount of \$805,083.55;

Third: the funds were owned by, under the care, custody and control of the Tom Green Community Action Council, Inc.;

Fourth: the Tom Green Community Action Council, Inc received benefits in excess of \$10,000 in each one-year period for the years 2000, 2001, and 2002, pursuant to a federal program involving a grant from the Department of Health and Human Services to administer the Head Start Program and Early Head Start Program.

For the purposes of Title 18, United States Code, Section 666(a), the term "agent" means a person authorized to act on behalf of the Tom Green Community Action Council, inc. and included an employee, manager and representative.

FACTS

At all times material hereto:

The Tom Green Community Action Council, Inc.

(Community Action Council) was a private, non-profit corporation and organization which served Tom Green County and surrounding counties. The Community Action Council assists citizens of those counties by administering various federal and state programs designed to help those needing assistance. One of those programs administered by the Community Action Council was the Head Start Program.

The Head Start Program was (is) a federal program funded by public (federal) funds through the United States Department of Health and Human Services (HHS). The Head Start Program is a national program which provides comprehensive developmental services for America's low-income, pre-school children ages three to five and social services for their families. The Early Head Start Program expands the benefits of early childhood development to low-income families with children under three years of age and to pregnant women. The Community Action Council manages the Head Start Program and Early Head Start Program in the geographical area it covers operating approximately fifteen (15) Head Start Centers. In order to obtain funding for the Head Start and Early Head Start Programs, at the beginning of each fiscal year the Community Action Council would submit a budget/request for funds to HHS and federal monies would then be provided to the Community Action Council to operate the Head Start and Early Head Start Programs. Specifically, for fiscal year 2000, the Community Action Council received in federal funds through HHS approximately \$3,699,800.00; \$4,091,668.00 for fiscal year 2001; and, \$4,179,633.00 for fiscal year 2002. In addition, the Community Action Council received from HHS federal funds for the Early Head Start Program of approximately \$96,691.00 in fiscal year 2000, \$1,144,625.00 in fiscal year 2001, and, \$923,254.00 in fiscal year 2002.

Juan Domingo Cortez, also known as and hereinafter referred to as, **J.D. Cortez**, defendant herein, was an agent, that is the Executive Director, of the Community Action Council. In addition, J. D Cortez was also the president, director and registered agent of J&M Restaurant, Inc., doing business as *Henry's Diner*, a Mexican food restaurant located at 3015 Sherwood Way, San Angelo, Texas.

Michelle Ramirez Hernandez was an agent; that is an employee, of the Community Action Council and had held several positions including the job as the Head Start Program "Family Services Specialist". The organizational chart for the Community Action Council also shows Michelle Ramirez Hernandez as the "Administrative Assistant" to the Community Action Council Director, **J. D. Cortez**.

Lugardha Magana Martinez, also known as Luli Martinez was an agent, that is an employee of the Community Action Council and was the Fiscal Officer/Comptroller of the Community Action Council.

Schemes and Artifices to Defraud

Between on or about March 1, 2000, and on or about June 30, 2002, in the San Angelo Division of the Northern District of Texas, the defendant, J. D. Cortez, did knowingly embezzle, steal, obtain by fraud and intentionally misapply property valued at \$5,000 or more, to wit, funds in the amount of approximately \$805,083.55, which funds were owned by and under the care, custody, and control of the Tom Green County Community Action Council, an agency receiving funds from the United States Department of Health and Human Services to administer and operate the Head Start Program and Early Head Start Program. The schemes and artifices to defraud included:

A. The Restaurant Scheme

Rodolfo "Rudy" Castaneda owned and operated *Area Appliance*, a small appliance business dealing primarily with residential appliance repair. *A-Tex Supply* was a business that provided restaurant equipment, supplies and service to restaurants in the San Angelo area including *Henry's Diner*.

The defendant, **J. D. Cortez**, instructed Rodolfo "Rudy" Castaneda, owner of *Area Appliance*, and the owner of *A-Tex Supply* to submit fraudulent vouchers to the Community Action Council falsely showing that, between April 1, 2001, and November 1, 2002, approximately \$182,000.00 worth of equipment, supplies and services had been provided to various I-Lead Start facilities when, in truth and fact, the equipment, supplies and services had been supplied to **J. D. Cortez'** restaurant *Henry's Diner*. Equipment paid for by fraudulently obtained Head Start funds that was installed and used at *Henry's Diner* includes a commercial charbroiler and exhaust hood, an electric steam table, a stainless steel dish table and rack, commercial blenders, a food processor, a potato peeler and a disposer,

When **J. D. Cortez** became aware that some of these purchases were being questioned and that there might be a physical inspection of the Head Start centers, he instructed the owner of *A-Tex Supply* to install a charbroiler and exhaust hood identical to the one he had fraudulently obtained for *Henry's Diner*, at the Lincoln Head Start Center. At the instruction of **J. D. Cortez**, false and fraudulent invoices were also submitted to the Community Action Council to pay

for these items.

B. The Jaques Phony Repair Scheme

Jerry Jaques was a general repair and renovation contractor and did repairs and renovations on Head Start facilities for the Community Action Council since approximately 1992. Elma Jaques was the wife of Jerry Jaques who assisted in his business by preparing invoices. Ivan Havins III was an employee of *Henry's Diner*.

The defendant, J.D. Cortez, between 1997 and November 1, 2002, instructed Jerry Jaques to falsely inflate his invoices for repairs and renovations for Head Start facilities and, in some instances, to submit invoices for repairs and renovations not made, fraudulently causing the Community Action Council to pay approximately \$268,000.00 to Jerry Jaques for repairs and renovations not done or whose costs were falsely inflated.

Initially, Jerry Jaques would give the defendant, **J. D. Cortez**, one half of the fraudulently obtained payments from the Community Action Council. These payments **J.D. Cortez** were usually made in cash by Elma Jaques at *Henry's Diner*. After some time, the split of the fraudulent proceeds of this scheme to defraud was changed from a 50-50 split to Jerry Jaques keeping two thirds and **J.D. Cortez** getting one third. This was done because Jerry Jaques was paying income taxes on the entire amount whereas **J. D. Cortez** was not reporting to the Internal Revenue Service his receipt of the income from this fraud.

While Elma Jaques normally gave the defendant, **J. D. Cortez**, cash, on several occasions when she did not have sufficient cash, **J.D. Cortez** instructed her to write checks,

one time instructing her to write a \$5,000.00 check payable to an employee of *Henry's Diner*, Ivan Havins III, and another time to write a \$3,000.00 check and Havins' name was later filled in. Both of these checks were cashed by Havins and the monies given to **J. D. Cortez**.

C. The Ocampo False Billing Scheme

Beginning in or about April 2001, and continuing until on or about September 2001, the defendant, **J. D. Cortez**, devised a scheme and artifice to defraud the Community Action Council and HHS by causing five checks totaling approximately \$38,337.36 to be issued by Community Action Council to Jesse Ocampo an employee at *Henry's Diner*, and then instructing Ocampo to cash the checks and give the proceeds to him (**J. D. Cortez**).

J. D. Cortez, would make, or cause to be made, and submitted to the Community Action Council false invoices, fraudulently representing that they were from Jesse Ocampo for the purchase of supplies for the Head Start Program when, in truth and fact, Ocampo had purchased no supplies and submitted no invoices to the Community Action Council. The defendant, **J. D. Cortez**, would also make, or cause to be made, false Community Action Council documents supporting the payments to Ocampo. Specifically, **J.D. Cortez** directed Lugardha Magana Martinez to prepare the false documents which included purchase orders and invoices to make it appear that Ocampo was purchasing supplies for Head Start.

After the checks were issued, **J. D. Cortez** would bring the checks to Ocampo and instruct him to cash them. After cashing the checks, Ocampo brought the cash to **J.D. Cortez**

and gave all of it to him. Ocampo received no proceeds of these fraudulently obtained checks.

D. The Johnson False Billing Scheme

Beginning in or about March, 2001, and continuing until on or about November, 2002, the defendant, **J.D. Cortez**, devised a scheme and artifice to defraud the Community Action Council and HHS by causing nine checks totaling approximately \$51,013 to be issued by Community Action Council to Vanessa Johnson. Vanessa Johnson had been an employee of the Community Action Council and contracted with the Community Action Council as an independent contractor.

The defendant, **J.D. Cortez**, instructed Vanessa Johnson, an independent contractor, to falsely inflate her invoices for research on grants, and, in some instances, to submit totally false invoices for such research and also submit invoices for supplies to the Head Start program, when in truth and fact, the research was not done and no supplies have been furnished to the Head Start Program. As a result of these false and fraudulent invoices the Community Action Council paid approximately \$51,013 to Vanessa Johnson.

Vanessa Johnson, at the direction of the defendant, J. D. Cortez, would make or cause to be made and submitted to the Community Action Council false invoices, fraudulently representing that they were for the purchase of supplies for the Head Start Program when in truth and fact, Johnson had purchased no supplies. The defendant, **J. D. Cortez**, would also make, or cause to be made, false Community Action Council documents supporting the payments to Johnson.

Initially, Vanessa Johnson would give the defendant, **J. D. Cortez**, one half of the fraudulently obtained payments from the Community Action Council. Usually, these payments to **J. D. Cortez** were made in cash by Vanessa Johnson at *Henry's Diner*. After some time, **J. D. Cortez** instructed Vanessa Johnson that the split of the fraudulent proceeds of this scheme to defraud was to be changed from the 50-50 split to a four way split with equal amounts going to Vanessa Johnson, **J.D. Cortez**; Lugardha Magana Martinez, also known as Luli Martinez and Michelle Hernandez. At the instruction of **J.D. Cortez**, Vanessa Johnson would cash the fraudulently obtained Community Action Council check, divide the proceeds four ways and give Lugardha Magana Martinez the cash for herself, **J.D. Cortez** and Michelle Hernandez.

E. The Rivera False Billing Scheme

As a part of this scheme and artifice to defraud, Lugardha Magana Martinez talked with **J.D. Cortez** about her brother in law Robert Leslie Rivera needing work. **J.D. Cortez** told her to include Robert Leslie Rivera in a walk through of the Lincoln Junior High. This unused public school location was being considered as a possible Head Start Center. Even though it was determined not to be economically feasible, with the knowledge and consent of **J.D. Cortez**, Robert Leslie Rivera was instructed by Lugardha Magana Martinez to submit to the Community Action Council a false invoice, fraudulently representing that it was for repairs and/or renovations to the Lincoln Head Start facility. In truth and fact, the invoice had been falsely inflated or the work had not been done at all, thereby causing the Community Action Council to issue a check on June 26, 2001, in the amount of \$3,529.83 to Robert Leslie Rivera.

J.D. Cortez decided to have Lugardha Magana Martinez and Robert Leslie Rivera submit an additional false invoice fraudulently representing that Robert Leslie Rivera had built and sold to the Community Action Counsel a number of computers. The actual false invoice was created at the direction of **J.D. Cortez** by Lugardha Magana Martinez and was submitted to the Community Action Council. This false invoice fraudulently represented that it was for the purchase of sixteen computers when, in truth and fact, Robert Leslie Rivera had not built and sold and delivered to various Head Start facilities sixteen computers as reflected in this invoice. Based on the representations in the false invoice, on April 30, 2001, the Community Action Council did issue a check in the amount of \$55,998.24 to Robert Leslie Rivera. Robert Leslie Rivera deposited this check in his bank account and later withdrew a total of approximately \$36,000 which he gave to Lugardha Magana Martinez, who then evenly split between herself, **J.D. Cortez** and Michelle Hernandez, another co-worker.

F. The Magana False Billing Scheme

Angel Magana was the manager of the "Gentle Touch Auto Lube" in San Angelo, Texas and is the brother of Lugardha Magana Martinez. As a part of this scheme and artifice to defraud, Martinez talked with **J.D. Cortez** about her brother Magana needing work. **J.D. Cortez** told her to issue checks to Magana as if he were doing renovations on the various Head Start Centers **J.D. Cortez** and Martinez decided to then have Magana cash the checks and split the money with them and a co-worker, Michelle Hernandez (Hernandez). Magana agreed with this scheme to defraud and aided the theft by accepting the checks and cashing them and returning a portion of the proceeds to Martinez.

Between March 13, 2001 and May 17, 2001, a total of five checks were issued at the direction of **J.D. Cortez** and **Martinez** on the account of the Community Action Council all made payable to Magana and totaling \$78,738.28 Each of these checks had supporting documentation that was prepared by Martinez. This supporting documentation fraudulently prepared by Martinez included nine false invoices and purchase orders showing that the payments were for repairs done at various Head Start Centers. In truth and fact, the invoices and purchase orders were false and fraudulent and no such work had been done at all by Magana.

In order to cash these fraudulently obtained checks and to aid and abet the theft and embezzlement of Community Action Council funds by **J.D. Cortez**, **Martinez** and **Hernandez**, Magana opened a bank account and as the checks were received from Martinez he would deposit them in that account. At the direction of Martinez, Magaria would withdraw most of the money in cash and give it to Martinez. Martinez would then divide the money received from Magana between herself, **J. D. Cortez** and **Hernandez**. Of the approximately \$78,738.28 obtained by this fraud, **J.D. Cortez**, **Martinez** and **Hernandez** each received approximately \$25,000 while Magana was allowed to keep the remainder, approximately \$3,738.28.

G. The Lincoln Junior High Fire Scam

After a fire at the Lincoln Junior High School (Lincoln) in San Angelo, Texas, **J. D. Cortez** directed employees of the Community Action Council to prepare false and fictitious statements and submit them to HHS stating that repairs and renovations for Head Start classrooms had been made to the part of Lincoln that burned and that Head Start supplies had also been destroyed in the fire. Lincoln was a no longer used

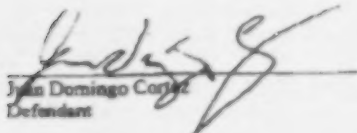
public junior high and a part of the building and outbuildings were used as a Head Start Center. The fire occurred in portion of the building that was not used by Head Start as the cost to renovate it had been determined to be too great.

At the direction of **J. D. Cortez** a one-time funding application for \$75,000.00 was submitted to HHS falsely and fraudulently representing that materials and supplies in the amount of \$21,062.00 had been completely destroyed in the fire and that repairs had been made to the building totaling \$53,938.00, when, in truth and fact, no repairs had been made to the building and no materials or supplies had been destroyed.

Shortly after, an additional application for \$50,000.00 was submitted to HHS at the direction of **J. D. Cortez**, falsely and fraudulently representing that an additional \$50,000 was needed for supplies and repairs related to the fire. Based on the false and fictitious representations and statements submitted at **J. D. Cortez's** direction, HHS made additional payments to the Community Action Council totaling \$125,000.


All in violation of Title 18, United States Code, Section 666(a) and 2.

I have read (or had read to me) this Factual Resume and have carefully reviewed it with my attorney. I fully understand it and I voluntarily state that all of the facts set forth above in this Factual Resume are true and correct.


Juan Domingo Cortez
Defendant


8/27/52
Date

I am the defendant's counsel. I have carefully reviewed every part of this Factual resume with the defendant. To my knowledge and belief, my client's statement that the said Factual Resume is true and correct is a truthful, informed and voluntary one.

"S/ "

Gerald H. Goldstein
Attorney for Defendant

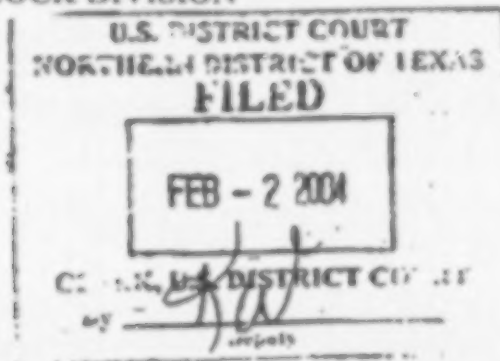
8/27/03
Date

"S/ "

Van G. Hilley
Attorney for Defendant

8/27/03
Date

APPENDIX L
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION



UNITED STATES OF AMERICA

- V. CASE NO. 2003CR00024

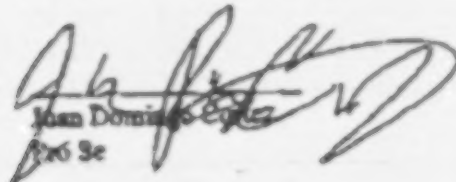
JUAN DOMINGO CORTEZ

NOTICE OF APPEAL

Notice is hereby given that JUAN DOMINGO CORTEZ, the defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment of conviction entered in this action on January 23, 2004.

Dated February 2, 2004.

Respectfully submitted:



Juan Domingo Cortez
Pro Se



APPENDIX M

1 THE COURT: All right, sir. How do you plead to
this

2 information? Guilty or not guilty?

3 THE DEFENDANT: Guilty.

4 THE COURT: If you would raise your right hand, I
5 need to have you placed under oath.

6 (THE DEFENDANT IS SWORN)

7 THE COURT: Now that you have been placed
under

8 oath, sir, do you understand that you need to answer all of
9 my questions truthfully?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: I have been handed a document
12 captioned Plea Agreement. It's showing to be signed by
Mr.

13 Cortez, as well as by his attorneys. It's also signed by
Roger

14 McRoberts, Assistant United States Attorney.

15 Mr. Cortez, have you read over and have you signed
16 this plea agreement?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand the terms and
19 conditions of the agreement?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you agree with those terms and
22 conditions?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand, sir, that under
25 paragraph 12 of the agreement, you are, in effect, giving
up

1 your right to appeal or otherwise challenge you conviction
2 or sentence imposed in this case except for the very limited
3 reasons as set forth in that paragraph. Do you understand
4 that?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Now, Mr. Cortez, are you pleading
7 guilty to this information because you are guilty?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Is your guilty plea the result of any
10 force or threats on the part of the government?

11 THE DEFENDANT: No, sir.

12 THE COURT: Have you in the past been treated
for

13 any type of mental illness or drug addiction?

14 THE DEFENDANT: No, sir.

15 THE COURT: Are you, this morning, under the
16 influence of any type of medication?

17 THE DEFENDANT: I have multiple sclerosis, and
18 I'm taking some medication for that, yes sir.

19 THE COURT: Does that medication have any
20 adverse effect upon your ability to think?

21 THE DEFENDANT: No, sir.

22 THE COURT: Do you understand, sir, that if I
accept

23 this guilty plea, it could have an adverse impact upon
certain

24 of your civil rights, such as the right to vote, the right to
25 hold public office, the right to serve on juries, things of

APPENDIX N

1 obtains suitable employment, that he maintains a law-
abiding 2 life-style, and that he pays the restitution and the
fine as

3 ordered by the court.

4 The special assessment is imposed because the law
mandates 5 that it be.

6 Now, Mr. Cortez, you have the right of appeal as
authorized 7 by law or as stated in your plea agreement.
Should

8 you choose to appeal, you must file your notice of appeal
9 within ten days from today. If you file that notice of
appeal, 10 you may also file a motion with the court seeking
11 permission to appeal at no cost to yourself, but rather at
the 12 cost of the government. Should you file that motion, I
will 13 take it under advisement and rule on it just as soon as
I can.

14 You may stand aside.

15 (END OF HEARING)

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1 I certify that the foregoing is a correct transcript from
2 the record of proceedings in the above-entitled matter.
3 further certify that the transcript fees and format comply with
4 those prescribed by the Court and the Judicial Conference of
5 the United States.

6

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8

9

DATE APRIL 13, 2004

10 Mechelle Daniel

11 Official Court Reporter

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APPENDIX-O
TITLE 18>PART II> CHAPTER 235 §3742
§3742. REVIEW OF A SENTENCE

(a) Appeal by a Defendant.— A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of Sentencing guidelines; or
- (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
- (4) was imposed for an offense for which there is no Sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.— The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a

a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea Agreements.— In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(D) Record on Review.— If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.— Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553 (a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553 (c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.— If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court **shall remand** the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the

appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing Upon Remand.— A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553 (a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553 (c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a Sentence by a Magistrate Judge.— An appeal of an otherwise final sentence imposed by a United

States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline Not Expressed as a Range.— For the purpose of this section, the term “guideline range” includes a guideline range having the same upper and lower limits.

(j) Definitions.— For purposes of this section—

(1) a factor is a “permissible” ground of departure if—

(A) advances the objectives set forth in section 3553 (a)(2); and

(B) is authorized under section 3553 (b); and

(C) is justified by the facts of the case; and

(2) a factor is an “impermissible” ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).